

**DO NOT CIRCULATE
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**DOCKET NO. DR21-76 Petition of KEKAHA
AGRICULTURE ASSOCIATION, a Hawaii
agricultural cooperative
For Declaratory Order to Designate Important
Agricultural Lands for approximately 12,123 acres at
Kekaha, Kauai; TMK 4-1-2-002:001 Por.**

DOCKET REVIEW

**ACTION MEETING
December 23, 2021**



**Daniel E. Orodenker
Executive Officer**

Submitted: DEC 17, 2021

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1. EXPLANATION OF THE PROCEEDING BEFORE THE LAND USE COMMISSION

This proceeding before the Land Use Commission (“Commission”) is to consider the Petition for Declaratory Order to Designate Important Agricultural Lands (“Petition”) filed by Petitioner KEKAHA AGRICULTURE ASSOCIATION (“Petitioner” or “KAA”), by and through its attorneys Schlack Ito, A Limited Liability Law Company, respectfully petitions the Land Use Commission of the State of Hawaii (“Commission”) to issue a declaratory order designating approximately 12,123 acres of land at Kekaha, Kauai, more particularly described below, as Important Agricultural Lands (“IAL”) pursuant to §§ 205-44 and -45 of the Hawaii Revised Statutes (“HRS”) and §§ 15-15-98, -999, -120 and -121 of the Hawaii Administrative Rules (“HAR”). **The proceedings are not a hearing to consider the reclassification of the Petition Area.**

Petitioner proposes to designate the vast majority of the Kekaha Ag Lands (approximately 95 percent or 12,123 acres) as IAL. The Kekaha Ag Lands that KAA is not proposing to designate as IAL (“Remainder Land”) are approximately 639 acres (approximately 5 percent of the Kekaha Ag Lands). The Kekaha Ag Lands are a single Tax Map Key (“TMK”), which is TMK 4-1-2- 002:001, as more particularly depicted on the map attached to this Petition as Exhibit A. The “Agricultural Land Assessment For The Kekaha Agriculture Association Proposed Important Agricultural Land, Island of Kaua‘i, November 2021,” prepared by PBR Hawaii (“ALA”) is attached as Exhibit B. Table 1 (below) shows the TMK number, the area proposed to be designated IAL, and the area that is not proposed to be designated as IAL. 4 Table 1: TMK and Proposed IAL Areas Tax Map Key Parcel No. Total Acres (Kekaha Ag Lands) proposed IAL Acres Non-IAL Acres (Remainder Land) 4-1-2-002:001 Por. 12,762.26 12,123 639.26 Total Acres 12,762.26 12,123 639.26 Percentage of Total 95% 5% 100% The KAA land is actively used by Petitioner (i.e., the members of the agricultural cooperative) for agricultural purposes. The reason for the submission is to obtain a declaratory order designating the KAA lands as IAL. Such designation is appropriate under the applicable constitutional, statutory, and regulatory frameworks. Consistent with those frameworks, Petitioner desires IAL designation to secure the KAA’s agricultural use in the future and to enable Petitioner to take advantage of incentives offered now or in the future in connection with its ownership and use of IAL.

The Petitioner has a Restated and Amended Memorandum of Agreement dated August 29, 2008 with the ADC to manage and operate the Kekaha Ag Lands, which has a term of 20 years.

Petitioner filed the Petition pursuant to Hawai‘i Revised Statutes (“HRS”) §§205-44 and 205-45 and Hawai‘i Administrative Rules (“HAR”) §§15-15-98, 99, 120, and 121. HRS §205-45 authorizes a farmer or landowner with lands qualifying under the standards and criteria provided in HRS §205-44 to file a petition for declaratory order to designate lands as Important Agricultural Lands (“IAL”).

As defined by HRS §205-42(a), IAL:

- (1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
- (2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
- (3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

Under HRS §205-42(b), “[t]he objective for the identification of [IAL] is to identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations.”

HRS §205-42(b) further provides that the State shall undertake the following to achieve this objective:

- (1) Promote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses; and
- (2) Establish incentives that promote:
 - (A) Agricultural viability;
 - (B) Sustained growth of the agriculture industry; and
 - (C) The long-term agricultural use and protection of these productive agricultural lands.

Petitioner is not seeking a reclassification of land pursuant to HRS §205-45(b) in conjunction with the Petition to designate IAL (Petition pg. 20, Section II). Petitioner is also voluntarily waiving its rights to assert, claim or exercise any credits pursuant to HRS §205-45(h) and shall not attempt to reclassify any of the Kekaha Ag lands as part of this petition. Petitioner points out that this waiver is limited to the aforesaid credits, and shall not apply to any other right, credit, entitlement, or privilege that Petitioner may currently have or may have in the future with respect to any of KAA lands. (Petition pg. 21, Section II).

HRS § 205-45(b) provides that a petitioner requesting designation of IAL may also seek reclassification of land in the agricultural district to the rural, urban, or conservation district, or a combination thereof. Petitioner is not seeking such reclassification. Furthermore, Petitioner is voluntarily waiving its right to claim or exercise any “credits” provided for under HRS§ 205-45(h) to reclassify any other of the Kekaha Ag Lands. Per the Attorney for Petitioner, Douglas A. Codiga, the foregoing waiver is limited to the

aforesaid credits, and shall not apply to any other right, entitlement, or privilege held now or in the future with respect to any of the KAA lands.

2. PROCEDURAL MATTERS

On December 2, 2021, Petitioner filed its Petition for Declaratory Order to designate Important Agricultural Lands and Exhibits A through C with filing fee. Copies were sent to State Office of Planning (“OP”), State Department of Agriculture (“DOA”), and County of Kauaʻi, Planning Department (“PD”).

On December 6, 2021, the Commission received correspondence from ADC in support of the Petition.

On December 13, 2021, the Commission mailed out the December 22-23, 2021 meeting agenda to Parties, Statewide, and Kauaʻi mailing/emailing lists.

On December 15, 2021, the Office of Planning and Sustainable Development (“OPSD”) filed its draft comments and recommendation on the Petition for Declaratory Order.

On December 16, 2021 the County of Kauaʻi (“PD”) sent an email advising that PD had no objections to the Petition for IAL. On the same day, Department of Agriculture (“DOA”) filed its comments and recommendation on the Petition for Declaratory Order.

On December 17, 2021, the ADC submitted additional correspondence to support the Petition.

A hearing is scheduled on December 23, 2021, on this matter.

3. Preliminary issue of Concern - Potential Petition Defects:

Prior to any review of the commission on the suitability of the land for designation, there is concern that this petition may not be authorized. As of the date of this staff report there is uncertainty as to whether or not KAA has the ability to subject the State lands in the petition to permanent IAL status and whether it has obtained the proper authorizations. This must be addressed and a determination made prior to any discussion on the merits of the petition.

- A. During review of this Petition, LUC staff was unable to determine how the Kekaha Agriculture Association (KAA) was authorized to file this IAL petition before the State of Hawaiʻi Land Use Commission. **State** land property issues can be complex and the way the land is held can have a bearing on whether the Petition was properly filed.

If KAA is not authorized to file this petition or the petition is not authorized under 205-44.5 then the LUC cannot entertain the petition. Before the Petitioner proceeds with its presentation, it should be determined whether KAA was in fact authorized to file the Petition and whether or not the evidence it has presented in that regard is sufficient. Staff

would caution the Commissioners that we have never accepted verbal testimony as to authorization. Documents need to be produced (if it is determined that further evidence is required) rather than reliance on testimony.

The Petition states that the State of Hawai'i is the owner of the property and provides Petitioner's Exhibit C which is a letter of from the Kekaha Agriculture Association, a Hawaii agricultural cooperative, authorizing Douglas A. Codiga and the law firm of Schlack Ito LLC to prepare and process a Petition to the State of Hawai'i Land Use Commission for Declaratory Order to Designate Important Agricultural Lands, and to take such other actions as may be reasonable necessary in furtherance thereof.

However, this is just an authorization for representation. There is not any documentation from ADC (assuming they have the authority to grant permission to file a petition) and there is not any document confirming that the Department of Agriculture (or any Department/Board of Land and Natural Resources or other State entity) authorized ADC to delegate its authority to allow lessees/tenants to permanently commit State lands to IAL designation. (Note: on December 17, 2021 LUC received minutes of an ADC Board meeting purportedly authorizing KAA to file the petition.)

The way the land is held by the ADC must first be ascertained to determine what entity can, from a legal standpoint, authorize KAA to file the Petition. If the land is only EO'd (Executive Ordered) to either DOA or ADC, then approval needs to come from the Board of Land and Natural Resources as the land is considered "public lands". Staff has no evidence the BLNR has approved such an action. If, on the other hand, the land has been granted to ADC in some manner, then ADC can in fact authorize KAA to file the Petition.

However, as set forth above, we do not have any evidence of such authorization other than a letter of support. Even if ADC is able to grant authorization, a letter of support is not sufficient to establish authorization. (Note: Subsequently received minutes of the ADC Board Meeting may suffice in this instance.)

The statute governing all EO'd land is HRS section 171-11:

"Lands while so set aside for such use or purpose or when acquired for roads and streets shall be managed by the department, agency, city and county, county, or other political subdivisions of the State having jurisdiction thereof, unless otherwise provided by law. Such department, agency of the State, the city and county, county, or other political subdivisions of the State in managing such lands shall be authorized to exercise all of the powers vested in the board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry covering such lands for such use as may be consistent with the purposes for which the lands were set aside on the same terms, conditions, and restrictions applicable to the disposition of public lands, as provided by this chapter all such dispositions being subject to the prior approval of the board; provided that any nonrenewable dispositions granting rights for a period not in excess of fourteen days shall not require (1) the approval of the board or (2) public auction or public advertisement for sealed tenders; and provided further that disposition of lands set

aside for use as agricultural parks pursuant to chapter 166 shall not be subject to the prior approval of the board. If at the time of the disposition of any such leases the board shall have approved the same, any order withdrawing or setting aside any or all of such lands for any other public purpose shall be made subject to such leases. Subject to section 5(f) of the Act of March 18, 1959 (73 Stat. 6), all proceeds from such lands shall be deposited into the appropriate funds provided by law.”

Documents received on December 17, 2021 by the LUC seem to indicate that the land is held by ADC under an “EO”. As set forth above, this would seem to indicate, and there is actually an admission in the documents, that BLNR must authorize the filing of the petition. ADC did provide a letter of support for the Petition; however, no information was provided to support how a lessee/tenant (KAA) can take action that will permanently affect the land use designation of property that it does not own and no documentation has been provided to substantiate that the owner, State of Hawaii (BLNR), is in agreement.

The Department of Agriculture (“DOA”) has been asked to comment on this matter by OPSD, and their comments have not been received yet (12/10/21).

It remains unclear to LUC staff what agency has the authority to grant permission to KAA to file the petition. LUC staff feels that authorization to file the Petition must be explained and evidence presented that KAA has in fact been granted such authorization by the correct organization or agency. The Commission should question KAA prior to talking up the petition.

B. Ability to designate State Land in a Piecemeal Manner

Under Section 205-44.5 HRS the State is required to designate state lands in a comprehensive manner. Pursuant to this section the BLNR, in conjunction with the DOA, is required to submit a petition for designation of all state lands that meet the criteria for designation. 205-44.5 does not contain authorization for State lands to be submitted for designation in a piecemeal manner. By comparison, Chapter 205 specifically sets forth that private lands can be designated IAL either piecemeal, by private landowners submitting voluntary petitions **or** by county wide designation similar to the process the commission is currently reviewing from the City and County of Honolulu. Chapter 205 does not contain a similar section for designation by ***State*** land lessees.

It is strongly suggested that the LUC Deputy AG be consulted with regard to the Commission’s legal limitations on designation of state lands prior to proceeding.

The two questions set out above are **preliminary** to the commission taking up this petition for designation. Both of them should be answered to the Commission’s satisfaction **before** proceeding to the case in chief. Should the commission determine that KAA was properly authorized to file the petition for IAL designation it may proceed with its analysis

of the *suitability* of the land for designation.

4. STANDARDS AND CRITERIA FOR IDENTIFYING IAL

Standards and Criteria to Identify IAL HRS §205-44(c) provides standards and criteria to identify IAL. HRS §205-44(a) provides that lands identified as IAL need not meet every standard and criteria, but rather, lands meeting any of the criteria shall be given initial consideration, provided that the designation of IAL shall be made by weighing the standards and criteria with each other to meet:

- 1) the constitutionally mandated purposes in Article XI, Section 3, of the Hawai‘i Constitution; and
- 2) the objective and policies for IAL set forth in HRS §205-42 and HRS §205-43. The standards and criteria to identify IAL set forth in HRS §205-44(c) are:
 - 1) Land currently used for agricultural production;
 - 2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel-and energy-producing crops;
 - 3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
 - 4) Land types associated with traditional native Hawaiian agricultural uses, such as taro cultivation, or unique agricultural crops and uses, such as coffee, vineyards, aquaculture, and energy production;
 - 5) Land with sufficient quantities of water to support viable agricultural production;
 - 6) Land whose designation as important agricultural lands is consistent with general, development and community plans of the county;
 - 7) Land that contributes to maintaining a critical land mass important to agricultural operation productivity;
 - 8) Land with or near support infrastructure conducive to agricultural productivity, such as transportation to markets, water or power. The information in this assessment is provided to demonstrate that the KAA land is consistent with the standards and criteria to identify IAL as set forth in HRS §205-44(c).

Current and Future Agricultural Operations

The KAA petition comprises lands that either are currently in agricultural use or historically have been used for agricultural purposes. Current agricultural operations on the KAA lands includes cultivation of diversified crops, aquaculture, research crops, and traditional native Hawaiian agricultural crops. Diversified crops include alfalfa, melon, squash, papaya, avocado, banana, mango and other fruits and vegetables.

Diversified crops grown on the KAA lands vary based on growing cycles and market conditions. Research crops and seed production are mostly used for cultivation of corn. Along the makai portions of the KAA lands, there are various aquaculture ponds used for production of shrimp. In addition, traditional Hawaiian crops such as dryland taro are grown within the KAA lands with plans to develop lo‘i for wetland taro cultivation as well. KAA operates and maintains agricultural infrastructure to serve and support agricultural use on the KAA lands, which ADC licenses to a mix of large agricultural entities and individual tenant farmers.

Currently there are three large licensees comprising operations that collectively account for the majority of active agricultural operations within the KAA lands totaling approximately 3,496 acres. This includes Hartung Brothers, Inc. (2,314 acres), Corteva Agriscience (767 acres), and Kauai Shrimp (415 acres). There are licensees on agricultural fields on the mauka lands, leased to Wines of Kaua‘i (127 acres) and Kōke‘e Farms (62 acres).

On the makai portions of the KAA lands, other agricultural lands (comprising a total of approximately 167 acres) are licensed to smaller farmers actively growing crops, including Becks Ag (10 acres). Several unlicensed fields (comprising approximately 3,894 acres) are fallow but are available for license to new farmers. The remaining approximately 4,377 acres of the KAA lands are designated for continuity for maintaining critical land mass important to agricultural operation as outlined in standards and criteria.

Petitioner’s Exhibit B Figure 2 shows the location of each of the licensees currently farming the KAA lands. The Statewide Agricultural Land Use Baseline 2015 (Melrose, Peroy, & Cares, 2015) confirms agricultural use on the KAA lands with seed production on most of the KAA land and smaller areas used for cultivation of aquaculture and tropical fruits. In addition, 5,371 acres of the KAA lands are covered under a restrictive covenant for the protection and preservation of agricultural production through 2029.

Petitioner’s Exhibit B Figure 3 shows the KAA lands topography and illustrates the slopes, showing areas with relatively gentle grades conducive for food crop production and supporting infrastructure such as agricultural buildings across most of the KAA lands. Approximately 56 percent of the KAA lands comprises relatively flat lands with less than 10% slope and 77 percent of the KAA lands comprises lands with less than 20% grade.

Petitioner’s Exhibit B Table 2 summarizes the KAA lands slopes. Most of the KAA lands is relatively flat, providing ideal topography for various types of crop production. Some areas of the KAA lands that are not currently cultivated along the mauka segments, especially in the eastern portion, are too steep for certain types of crops grown, or are drainage ways and streambeds. However, these areas support agricultural activities on other parts of the land that are cultivated and are important parts of the overall KAA lands for: 1) land stewardship, soil conservation, and cohesion and continuity of agricultural uses; and 2) maintaining a critical land mass important to overall agricultural operation productivity.

Table 2: Slope Summary

Slope	Acres	Percent
Less than 10%	6,775	55.9%
10%-20%	2,591	21.4%
20%-25%	596	4.9%
Greater than 25%	2,159	17.8%
Total:	12,123	100%

Agricultural Soils Productivity Ratings

The Detailed Land Classification System and Agricultural Land Productivity Ratings by the Land Study Bureau (LSB) (1967) are based on a five-class productivity rating system using the letters A, B, C, D, and E. The rating is based upon several environmental and physical qualities of the land such as soil condition, climate, surface relief, and drainage.

As shown on Petitioner’s Exhibit B Figure 4 and summarized in Table 3, approximately 10.7 percent of the KAA land is rated A, 45.6 percent of the KAA lands are rated B, 6.9 percent is rated C, 2 percent is rated D, 34.2 percent is rated E, and 0.6 percent is unclassified (Land Study Bureau, 1967).

Table 3: LSB Productivity Rating

Productivity Rating	Acres	Total IAL	% of IAL
	Acres		% of IAL
A	1,300		10.7%
B	5,525		45.6%
C	834		6.9%
D	244		2.0%
E	4,149		34.2%
Unclassified	71		0.6%
Total	12,123		100%

According to the LSB, only 2.8 percent and 8.6 percent of the total agricultural land on Kauaʻi is rated A and B respectively. Given the high percentage (56.3%) of the KAA land being rated as A and B, the productivity of the soil is strong, and the KAA land has been and continues to be used for active agriculture.

Solar Radiation

The KAA land receives sufficient solar radiation to support agricultural production. Mean annual solar radiation on the KAA land ranges from 190 to 220 watts per square meter per hour, based on information from the Evapotranspiration of Hawaiʻi Final Report prepared in February 2014 by Department of Geography, University of Hawaiʻi at Mānoa for U.S. Army Corps of Engineers Honolulu District and State of Hawaiʻi Commission on Water Resource Management (Giambelluca, et al., 2014).

Petitioner's Exhibit B Figure 5 shows the solar radiation levels received on the KAA land in graphic form.

Agricultural Lands of Importance to the State of Hawaiʻi (ALISH)

In 1977 the State Department of Agriculture (Hawaiʻi State Department of Agriculture, 1977) developed the Agricultural Lands of Importance to the State of Hawaiʻi (ALISH) classification system. The ALISH system is primarily, but not exclusively, based on the soil characteristics of lands and existing cultivation. There are three classes of land under the ALISH system: Prime, Unique, and Other.

The Prime ALISH rating is for lands best suited for production of food, feed, forage, and fiber crops. The land has the soil quality, growing season, and moisture supply needed to economically produce high yields of crops when the land, including water resources, is treated and managed according to modern farming methods.

The Unique ALISH rating is applied to lands other than Prime ALISH lands, that are used for production of specific, high-value food crops. Such lands have the special combination of soil quality, growing season, temperature, humidity, sunlight, air drainage, elevation, aspect, moisture supply, or other conditions, such as nearness to market, that favor the production of a specific crop of high quality and/or high yield when the land is treated and managed according to modern farming methods. Examples of such crops are coffee, taro, rice, watercress, and non-irrigated pineapple (Hawaiʻi State Department of Agriculture, 1977).

The Other ALISH ratings is for lands other than Prime or Unique that are of state-wide or local importance for production of food, feed, fiber, and forage crops. Such lands are important to agriculture in Hawaiʻi and yet they exhibit properties such as seasonal wetness, erodibility, limited rooting zone, slope, flooding, or drought that exclude the land from Prime or Unique rating classifications. Two examples are: 1) lands which lack adequate moisture supply to be qualified as Prime; and 2) lands with similar

characteristics and properties as Unique rated lands, except that the land is not currently in use for production of a “unique” crop.

These Other rated lands can be farmed sufficiently by applying greater amounts of fertilizer and other soil amendments, drainage improvement, erosion control practices, and flood protection. Lands with an Other ALISH rating can produce fair to good crop yields when managed properly. As shown on Petitioner’s Exhibit B Figure 6 and summarized in Table 4, approximately 67.1 percent of the KAA land is classified under the ALISH system: 41.1 percent is classified as Prime, and 26 percent is classified as Other.

Table 4: ALISH Rating

ALISH Classifications	Total IAL	
	Acres	% of IAL
Prime	4,979	41.1%
Unique	0	0%
Other	3,155	26.0%
Not ALISH	3,989	32.9%
Total:	12,123	100%

The balance of the KAA land is not classified under the ALISH system but: 1) is integral to overall use of the KAA land for agricultural operations and to KAA’s land stewardship; and 2) provides for a unified and clearly defined land area.

Agricultural Use History

The Kekaha Ag Lands have a long history of agricultural use dating back to the pre-Contact era. Traditional accounts and conditions indicate agricultural use in the Kekaha region prior to European arrival, as part of the traditional Hawaiian ahupua’a system. However, historical accounts suggest intensive agricultural uses on the KAA land were concentrated in the southeastern section of the Lands.

These accounts from the mid-18th and 19th centuries described the Kekaha region as rich with taro patches, fishponds, and coconut trees. Here the wetlands were fed in part by a natural spring at the base of the cliffs which supported the taro lo‘i of Kekaha. Other springs supported cultivatable lands at the base of the Pali bordering the Mānā Plain, but the region northwest of Kekaha was traditionally referred to as Mānā (arid) and described as a hot and dry place with large sections of marshlands.

The Mānā Plain is not flat. Two shallow, saucer-shaped depressions, >100 ft high sand dunes and alluvial fans at the mouths of gulches draining high-elevation land above the Pali are among the most prominent topographic features. No streams cross the

depressions or are present elsewhere on the plain, and prior to the excavation of the agricultural drainage ditch system evaporation and lateral groundwater flow were the only means of evacuating accumulated water from groundwater seepage, direct precipitation, and storm runoff. These and other low-lying regions on the Mānā Plain formerly supported perennial wetlands that expanded in wet and contracted in dry periods.

The wetlands began to be drained after sugar cane started to be planted on a commercial scale in the 1870s. An initial connection to the ocean was established at Kawai‘ele in 1878; First Ditch was completed by 1907; Cox Drain and Kīkīaola Harbor Drain were in use by 1910; and Nohili Ditch was excavated in 1922 when large-capacity drainage pumps were installed. The wetlands surrounding the loko pu‘uone (ponds) at Kawai‘ele, Kolo, and Nohili had been drained by 1931, and what remains the largest reclamation project in State history was completed when the final parcel was drained and planted in 1959.

Commercial agriculture on the Mānā Plain began with rice cultivation around the fringes of the perennial, depressional wetlands in the 1860s. After the treaty which removed the import tax on Hawaiian products entering the United States was ratified in 1875, sugar cane began to be grown commercially in 1878, and the Kekaha Sugar Company was created in 1898.

Groundwater was initially used to irrigate the cane fields and rice paddies, with spring water being supplemented by well water from 1890. However, crop failures caused by drought and irrigation water shortages motivated the construction of irrigation ditch systems that drew water from the perennial Waimea River.

The six-mile-long Waimea Ditch was constructed in 1903 and the 20- mile-long Kekaha Ditch, which connected with the pre-existing Mānā Pump Ditch, was completed in 1907. By 1920, water from Kekaha Ditch was being used to irrigate some 3,000 acres of land, and it is still the primary source of the irrigation water that supports diversified agriculture on the Mānā Plain. Under the operation of the Kekaha Sugar Company, sugar cane cultivation became the main agricultural operation on the KAA land, although dairy and beef cattle have historically been raised on the land.

Sugar operations flourished over the first half of the twentieth century until broader economic factors and shifts in agricultural production led to the decline and eventual closure of the Kekaha Sugar mill in 2000.

Water Resources

The KAA land has sufficient quantities of water, water-related infrastructure, and other agricultural infrastructure to support viable agricultural production, as summarized below.

Petitioner's Exhibit B Figure 7 shows the water resources and agricultural infrastructure on the KAA lands. KAA, under the control of ADC, has access to irrigation water provided by the Kōke'e Ditch Irrigation System (KODIS) and Kekaha Ditch Irrigation System (KEDIS). Water rights for the KAA land from the Kōke'e and Kekaha irrigation ditches are granted by Governor's Executive Order No. 4287.

The Kekaha Ditch was originally constructed in the early 1900s to supply sufficient water to the former sugar cane fields managed and operated by the Kekaha Sugar Company. Following the success and improvements to the Kekaha Ditch, the Kekaha Sugar Company initiated construction of the Kōke'e Ditch (constructed between 1923 and 1925), resulting in the existing ditch systems that provide significant water resources to the KAA land.

The KEDIS diverts water from the Waimea River supplying water along the approximate 27-mile ditch as far west as the reservoirs abutting Polihale State Park. The KODIS supplies water to the reservoirs on the mauka lands and is presently sourced from four major streams at the headwaters of the Waimea River watershed in Kōke'e State Park: Waikoali Stream, Kawaikōi Stream, Kauaikananā Stream, and Kōke'e Stream.

Under the terms of the 2017 Waimea Watershed Agreement:

- 1) Kōke'e Ditch supplies 0.5 mgd to the mauka lands; and
- 2) flows in Kekaha Ditch cannot exceed: a) 10 mgd (as measured at Hukipo Flume); and b) 6 mgd at times when flows in the Waimea River (measured at USGS gage 16031000) are less than 25 mgd.

Based on data collected from 2017 to present by KAA and reported to the Commission on Water Resource Management, the mean monthly flow in the:

- 1) Kōke'e Ditch is 0.5 mgd; and
- 2) Kekaha Ditch is 9.1 mgd.

In addition to water resources provided by the existing irrigation ditches, supplemental water is provided by existing wells within the KAA land. Since the 1890s, over 60 wells and shafts have been drilled on the KAA land, five of which remain in active use and supply <0.5 mgd. The other wells and shafts have been capped to prevent possible degradation of the groundwater.

Petitioner's Exhibit B Figure 7 shows the irrigation ditches, reservoirs, water infrastructure, well locations, and drainage pumps providing water resources across the KAA land. In addition to water from the Kōke'e and Kekaha irrigation systems and wells, the KAA land receives a mean annual rainfall of approximately 18 to 30 inches which varies by elevation, providing supplemental water resources for agricultural production.

General Plan for the County of Kaua'i and IAL

The General Plan for the County of Kauaʻi (2018) (“General Plan”) establishes priorities for managing growth and community development over a 20-year planning timeframe with policies to guide County decision-making by mapping land use patterns, describing what type of development is desirable, and by setting high-level priorities for infrastructure and programs.

The General Plan includes 10 sectors that provide the framework for the County’s expression of public policy concerning the needs of the people and the functions of government. The “Economy” portion of the General Plan includes a section on “Agriculture” which lists an objective to ensure long-term viability and productivity of agricultural lands. In addition, the section outlines policies to maintain the viability of agriculture on Kauaʻi, including a specific policy for “Protecting Important Agricultural Lands (IAL).”

The designation of the KAA land as IAL is consistent with this objective and these policies as the designation of the land as IAL will: 1) contribute toward the continuation of agriculture as an important source of income and employment; 2) help ensure sufficient agricultural lands in Kekaha by encouraging the continuation of agriculture activity in these areas; and 3) encourage more intensive use of productive agricultural lands.

After a four year process of engaging with residents, community leaders, government officials, business owners and landowners, Kauaʻi Planning Commission transmitted the General Plan Update to the Kauaʻi County Council in June 2017. The Kauaʻi County Council approved the General Plan in February 2018 and the mayor signed it into law on March 15, 2018.

The designation of the KAA land as IAL is consistent with the General Plan’s objectives and policies regarding maintaining the viability of agriculture. According to the General Plan’s Land Use Map, roughly half of the KAA land is designated as “Agricultural” with the remaining half designated as “Natural.”

Designating the KAA land as IAL is consistent with this General Plan’s Land Use Map as the lands will be preserved for agricultural production and natural areas for contiguous preservation of agricultural uses across the KAA land.

Petitioner’s Exhibit B Figure 8 shows the General Plan land use map illustrating land use designations for the KAA land.

County of Kauaʻi: West Kauaʻi Community Plan

The County of Kauaʻi’s Community Plans are policy documents intended to guide the County’s land use approvals, infrastructure improvements, and private sector investment decisions for the enhancement and improvement of the people of Kauaʻi. The County of Kauaʻi is organized into six regions. The KAA land is located within the West Kauaʻi Community Plan (WKCP) region. The WKCP represents the County’s land use policy at

the regional level. It is a long-range plan that considers a 20-year planning timeframe to the year 2040. The WKCP (2021) contains a map for various designations within the WKCP region.

The WKCP map designates roughly half of the KAA land as “Agriculture” with portions along the mauka boundary and the segment extending mauka of Kekaha and Waimea along the mountain slopes designated as “Natural.”

Petitioner’s Exhibit B Figure 9 shows the WKCP (2021) land use map illustrating land use designations for the KAA land. The County adopted the WKCP in December 2020 (County of Kaua‘i, 2021).

State Land Use District Boundaries

The State Land Use Law (HRS Chapter 205) establishes the State Land Use Commission and authorizes this body to designate all lands in the State into one of four districts: Urban, Rural, Agricultural, and Conservation.

The Kekaha Ag Lands are completely within the Agricultural District (Figure 10). HRS §205-2(d) specifies that lands within the State Agricultural district shall include (among other things): 1) activities or uses as characterized by the cultivation of crops; 2) farming activities or uses related to animal husbandry; 3) aquaculture; 4) agricultural tourism conducted on a working farm or a farming operation; and 5) open area recreational facilities.

Current uses on the KAA land are consistent with these authorized agricultural uses.

County of Kaua‘i Zoning and Land Mass Important to Agriculture Operating Activity

The County of Kaua‘i’s Comprehensive Zoning Ordinance (CZO) designates the majority of the KAA land as Agriculture District (A) with smaller portions of the KAA land as Open District (O). While most of the KAA land is within the Agriculture District, portions of the KAA land along the mauka boundary to the north and east and steeper section of the mauka lands comprising drainageways are zoned Open District.

According to the Kaua‘i County Code (KCC) §8-8.1, the purpose of the Agriculture District is to “protect the agriculture potential of lands within the County of Kaua‘i,” “assure a reasonable relationship between the availability of agriculture lands for various agriculture uses and the feasibility of those uses,” and “limit and control the dispersal of residential and urban use within agriculture lands.”

The KCC §8-9.1, states that the purpose of the Open District is to “preserve, maintain or improve the essential characteristics of land and water areas that are of significant value to the public as scenic or recreational resources” and “preserve, maintain or improve the essential functions of physical and ecological systems, forms or forces which significantly affect the general health, safety and welfare.”

Current uses on the KAA land are consistent with the purposes of the Agriculture District and the Open District.

Agricultural Infrastructure

In addition to the water resources infrastructure, as shown in Figure 7, the KAA land contains, gates, fencing, greenhouses, electrical infrastructure, storage facilities, shade/rain shelters for field workers, a base yard facility, and agricultural roads to facilitate agricultural production. There are also aquaculture-related facilities and infrastructure for shrimp cultivation, including earthen ponds, breeding and production facilities, and packing buildings.

Agricultural roads within the KAA land have nine direct access points to Kaumuali'i Highway, two direct access points to Kōke'e Road, and three direct access points to Kekaha Road for: 1) transportation of agricultural products to/from markets; 2) access to/from the KAA land for agricultural equipment.

As described in Section 7, there is significant water infrastructure for distributing and managing irrigation water across the vast area within the bounds of the KAA land. The KEDIS is comprised of a series of ditches, tunnels, and siphons that stretches approximately 27 miles, providing water resources to the majority of the agricultural fields along the Kekaha-Mānā plains.

The State has provided funding for the ADC to upgrade to the existing KEDIS, including \$5 million worth of new piping to replace portions of the system along the Mānā Plain. The KODIS is comprised of a series of ditches that terminates along the upper mauka agricultural fields within the KAA land.

On the mauka lands, there are three irrigation basins with gravity distribution systems for irrigation water. Plantation-era irrigation supply lines are present but will need repair and refurbishment in the future. While the mauka lands receive limited water from the Kōke'e Ditch irrigation system, a water pump with a 500,000 gpd capacity and irrigation force main pipeline have been purchased pending installation for future expansion of water resources on these lands. There are six irrigation reservoirs, three basins (smaller reservoirs in mauka fields), six pumping and filtering stations, two deep wells, and three Maui-style well shafts/pumping stations located across the KAA land.

The KAA land also includes a significant network of drainage ditches and canals throughout the makai fields, providing additional water infrastructure conducive to agricultural productivity. The KAA land includes various agricultural roads, providing transportation access to all the agricultural fields.

A key road (called Main Track from Kekaha to Kiko Road and Upper Saki Mānā Road from Kiko Road (in Mānā) to the 130 Reservoir) runs the length of the Kekaha-Mānā plains and connects to most of the fields along the makai portions of the KAA land. Supplemental agricultural roadways interconnect to the key road, creating an internal

network within the KAA land for distribution of goods and materials. Many agricultural roads within the KAA land feed into the major roadways of the West Kauaʻi region, including Kaumualiʻi Highway, Waimea Canyon Drive, and Kōkeʻe Road. These roads provide sufficient access points to transport agricultural goods to markets and consumers throughout the County and beyond.

5. AGENCY COMMENTS ON THE PETITION

PD, DOA and OP provided their comments on the Petition. The following summarizes their respective comments:

On December 16, 2021 PD sent an email regarding its Position

PD supports the Petition. (email by Jodi Higuchi Sayegusa) and described how approximately 6,440 acres of the 12, 123 acre Petition Area would meet the criteria established for IAL under the County of Kauaʻi Study (August 2015). The remaining portions of the 12, 123 acres, however, were still eligible for IAL designation under the voluntary landowner-initiated process, which allowed consideration of any agricultural lands that met any of the eight criteria of IAL.

The County noted that pursuant to the analysis regarding the IAL, lands that are designated as both Agricultural and Natural under the 2018 General Plan (“GP”) and 2020 West Kauaʻi Community Plan (“WKCP”) future land use maps comport with GP and WKCP policies.

The County also found that the Petition contains lands in both the Agricultural and Open County Zoning Districts and under Kauaʻi County Code (“KCC”) §8-8.1, which prioritize the protection of “existing and potential agriculture...while providing the opportunity for a wider range of the population to become involved in agriculture...” and followed approved identified purposes

In summary, the County described how the IAL designation would protect the County’s agricultural policies and further protect the agriculture potential to meet Kauaʻi’s present and future needs, and limit the dispersal of residential and urban use within agricultural lands. Under KCC§8-9.1, the Open District was “established and regulated to create and maintain an adequate and functional amount of predominantly open land to provide for the recreational and aesthetic needs of the community or to provide for the effective functioning of land, air, water, plant and animal systems or communities.” The Open-Zoned lands designation is further supported by the IAL designation and would support the purposes where the areas were not heavily cultivated.

DOA

On December 16, 2021, DOA provided their comments.

The DOA believes all of the eight IAL identification criteria had been met and that the Petition Area merits consideration for designation as IAL. In their response to Petitioner's statements as to how the petitioned lands met the eight criteria use for identifying potential IAL (Section 205-44, HRS), DOA provided their perspective on how Petitioner had satisfied the criterion.

DOA described how the acreage of the Petition Area was being utilized and who the three largest licensees were. There was, however, no indication in the Petition or attached exhibits that DOA could find which provided information on the future plans that the Petitioner or ADC had with respect to agricultural use of the 3,894 acres of lands available for licensing and farming.

The DOA had no objections, recommended conditions, or misgivings about the Petition although DOA recognized that the KAA and its licensee tenant members as authorized by the ADC appear to ensure continuity through 2027 only.

OPSD

OPSD provided IAL comments on December 15, 2021.

OPSD supports Petitioner's proposed IAL in its entirety subject to the conditions as recommended by DOA. OP believes that the Petition Area sufficiently meets seven of eight IAL criteria and partially meets the remaining IAL criterion.. OP believes, the Petition Area only partially meets criteria HRS § 205-44 (c) (4) with respect to traditional native Hawaiian agricultural uses. OP also mentioned Petitioner was excluding a rectangular area of approximately 639 acres or 5 % of the total parcel area of the Petition (see Petitioner's Exhibit A). This area is proposed to be part of the West Kauai Energy project, which will encompass the land area mauka and within the Petition Area.

OP described in detail how the criteria under HRS § 205-44 (c) was being met and why OPSD felt that after its review of all available information and Petitioner's representations , and weighing the IAL standards and criteria that the Petition Area sufficiently met 7 of the 8 criteria and partially met the remaining criteria.

OP supports the DOA's recommendation.

6. STAFF RECOMMENDATION

A. Potential Questions by Commissioners for the Petitioner

1. The Commission should inquire whether the water allocations will be enough for the current and future agricultural activity planned for the Petition Area and what authority

made the determination of adequate future water resources. What will happen during periods of extreme drought?

2. Archeological Resources and Cultural Resources in the Petition Area were not well addressed. The Petitioner's Agricultural Assessment states that there was a long history dating back to the pre-Contact era as part of the traditional ahupua'a system of the mid-18th and 19th centuries but fails to include any references for this information. Petitioner should be questioned to determine whether SHPD protocols are needed or established to handle these issues if they arise.
3. The Petitioner should provide reasons or justification as to why the land that will be utilized for a solar project was excluded from the Petition Area discussion. What is the State's policy on utilizing Agriculture designated land for solar farms?

- B. HAR §15-15-100(a) provides the alternative actions required of the Commission for a petition for declaratory order:

The [C]ommission, within ninety days after submission of a petition for declaratory order,¹ shall:

- (1) Deny the petition where:
 - (A) The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future; or
 - (B) The petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law; or
 - (C) The issuance of the declaratory order may adversely affect the interest of the State, the [C]ommission, or any of the officers or employees in any litigation which is pending or may be reasonably be expected to arise; or
 - (D) The petitioner requests a ruling on a statutory provision not administered by the [C]ommission or the matter is not otherwise within the jurisdiction of the [C]ommission; or
- (2) Issue a declaratory order on the matters contained in the petition; or
- (3) Set the petition for hearing before the [C]ommission or a hearings officer in accordance with this subchapter. The procedures set forth in subchapter 7 shall be applicable.

¹ The Petition was filed on December 2, 2021. Therefore, the 90-day timeframe in which the Commission is required to act on the Petition, including the *issuance* of any written declaratory order, expires on March 2, 2022.

If the matter is set for hearing, the [C]ommission shall render its findings and decision within one hundred twenty days after the close of the hearing, or if post hearing briefs are filed, forty-five days after the last brief is filed, unless a different time period is stated at the hearing.

The Commission is required to decide at this time whether it will (1) deny the Petition, (2) issue a declaratory order granting the IAL designation for the Petition Area in whole or in part, or (3) set the matter for a future hearing.

Pursuant to HAR §15-15-101, the Commission may also dismiss the Petition, without notice or hearing, if it deems that the Petition fails in material respect to comply with the declaratory order requirements of HAR subchapter 14.

Staff believes that the Petition meets the declaratory order requirements of HAR subchapter 14 in that Petitioner has provided the minimal information required to hear the Petition with the exception of the clarification on land ownership.

Upon review of the Petition, staff believes that, assuming the Petition was properly filed and authorized, the Petition Area satisfies the threshold for initial IAL consideration as it meets the eight standards and criteria pursuant to HRS §205-44(c).

The Petition and Exhibit B (Agricultural Land Assessment) provide considerable supporting information to show that the Petition Area in its entirety meets most of the eight standards; with certain portions meeting most of the standards. However, the DOA, OPSD, and the Petitioner's submittals do not provide adequate documentation to inform LUC staff on how ownership of the Petition Area is structured and how a tenant/lessee entity can initiate an IAL petition permanently affecting land use designation without written consent of the State of Hawai'i.

HRS §205-44(c) also provides the Commission with considerable discretion as to whether to designate the land as IAL. Such discretion includes granting IAL designation for only those portions of the Petition Area that meet the above statutory standards and criteria and denying IAL designation for those lands that the Commission believes fails to do so.

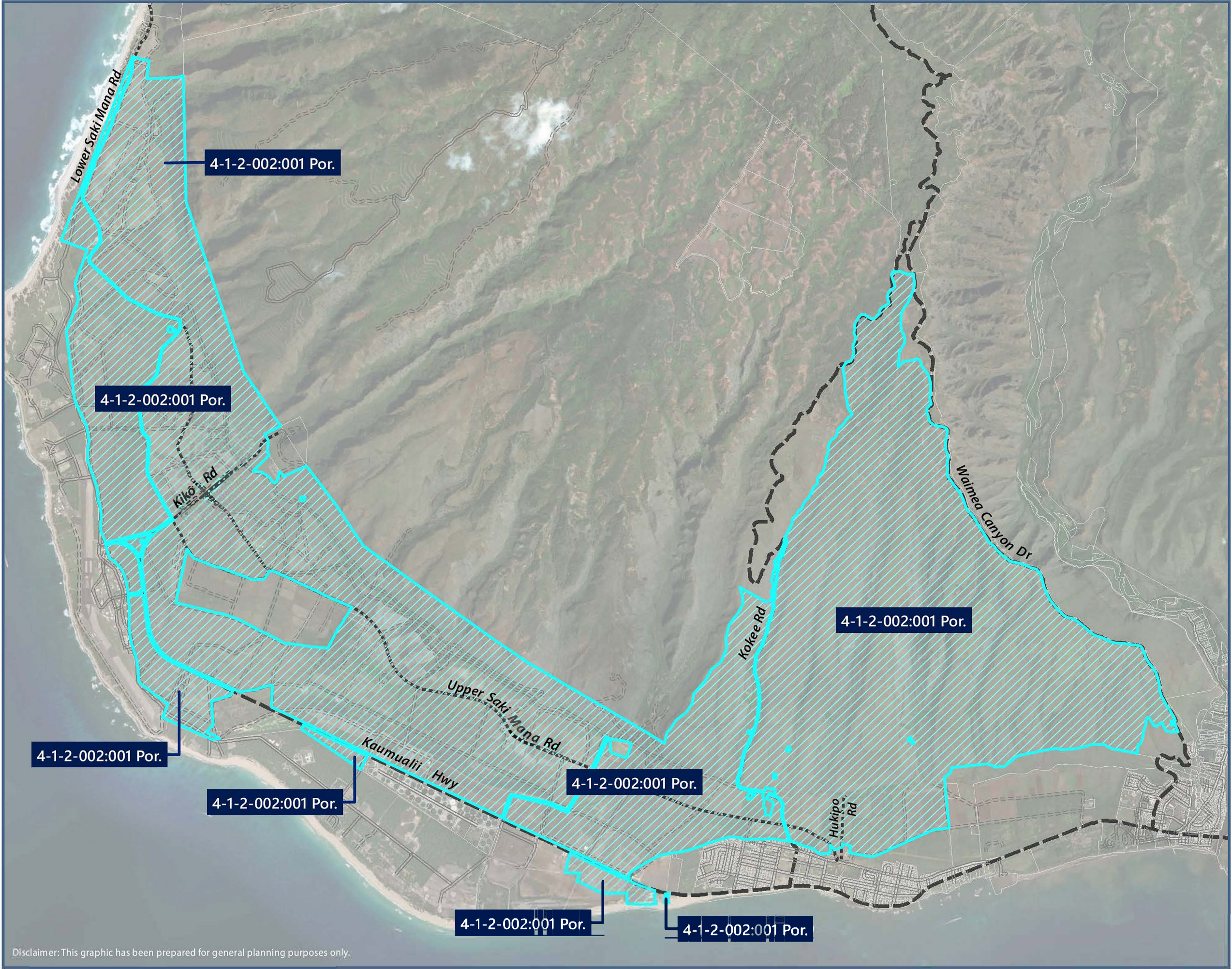
In the alternative, the Commission may decide that further briefing by the parties is warranted and may set the matter for hearing.

Staff recommends that if the Commission finds that the Petition is properly filed and KAA has authorization to submit state lands to an IAL designation and that State lands may be subjected to IAL designation in a piecemeal manner, and is inclined to issue a ruling on the Petition designating the Petition Area, in whole or in part, as IAL, it should be subject to the following conditions²:

² These conditions were imposed in fourteen of the petitions filed under Part III of HRS chapter 205 and approved by the Commission for IAL designation: Docket Nos. DR08-37/Alexander & Baldwin, Inc.

- 1) Petitioner shall comply with representations made to the Commission with respect to not claiming any credits described in HRS §205-45(h) with respect to the Petition Area.
- 2) Within seven days of the issuance of the Commission's Decision and Order, Petitioner shall record it with the Bureau of Conveyances.

(Kaua`i); DR09-38/Alexander & Baldwin, Inc. (Maui); DR10-42/Castle & Cooke Homes Hawaii, Inc. (O`ahu); DR11-43/Māhā`ulepū Farm LLC (Kaua`i); DR11-45/Parker Ranch, Inc. (Hawai`i); DR12-48/Grove Farm Company, Incorporated (Kaua`i); DR13-50/Trustees of the Estate of Bernice Pauahi Bishop dba Kamehameha Schools (Kaua`i); DR14-52/Trustees of the Estate of Bernice Pauahi Bishop dba Kamehameha Schools (O`ahu); DR16-56/Robinson Family Partners (Kaua`i); and DR17-59/Monsanto Company (O`ahu); DR18-61/Hartung Brothers Hawaii, LLC (O`ahu), DR18-62/Kualoa Ranch, Inc. (O`ahu), DR18-64/ Robinson Kunia Land LLC(O`ahu) and Malekahana Hui West (O`ahu) . These conditions are considered innocuous.



LEGEND


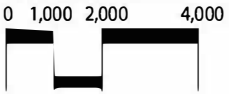

-  Proposed IAL Land
-  Major Road
-  Key Road
-  Paved Road
-  Unpaved Road

Source:
County of Kauai.
ESRI Basemap.

EXHIBIT A
TMK PARCELS AND PROPOSED IAL
KAA IMPORTANT AG LAND

KEKAHA AGRICULTURE ASSOCIATION ISLAND OF KAUAI

NORTH LINEAR SCALE (FEET)
0 1,000 2,000 4,000



Disclaimer: This graphic has been prepared for general planning purposes only.